INDEX

Subject Index

		Page
The Purpose of This Brief—		
	To Discuss the Injustice Resulting from Any Modification of the Existing Law	1
I	The Doctrine of Universal Battery Company v. United States, as Interpreted by the Courts, Should Not Now Be Disturbed	2
II	The Request for Modification in the Existing Rule Has No Support in Law or Administrative Experience	4
III	Requiring the Ascertainment of Primary Adaption or Chief Use to Depend Upon a Majority Count Is Not Administratively Feasible	12

Citations

Table of Cases:

American Bosch Magneto Corp v. *United States*, Nos. H-516, H-517 (pending in Court of Claims)	3
American Chain Co. v. *Eaton*, 58 F. (2d) 246 (D. C. Conn., Feb. 5, 1931)	2
Anthony Co. v. *United States*, 56 F. (2d) 481 (C. Cls. Mar. 7, 1932)	2
Bassick Mfg Co. v. *United States*, 44 F. (2d) 278 (C. Cls. Oct. 20, 1930)	2
Crawford Mfg. Co. v. *United States*, 50 F. (2d) 280 (C. Cls. June 1, 1931)	2
Cuno Engineering Corp. v. *United States*, 43 F. (2d) 259 (C. Cls. June 16, 1930)	2
Dalton & Balch, Inc. v. *United States*, K-372 (pending in Court of Claims)	3
Dalton Foundries, Inc. v. *United States*, 56 F. (2d) 483 (C. Cls. Mar. 7, 1932)	2
Dutton & Sons Co. v. *United States*, 59 F. (2d) 839 (C. Cls. June 6, 1932)	2
Eaton v. *American Chain Co.*, 63 F. (2d) 783 (C. C. A. 2, March 6, 1933)	2
Electric Storage Battery Co. v. *McCaughn*, 52 F. (2d) 205 (D. C. E. D. Penna. Apr. 28, 1931)	2
Englert Mfg Co. v. *United States*, 3 F. Supp. 873 (C. Cls. June 5, 1933)	3, 15

Page

Fairmont Tool & Forging Co. v. *United States*, 42 F. (2d) 591 (C. Cls. June 16, 1930) ---- 3

Frost Gear & Forge Co. v. *United States*, 52 F. (2d) 1022 (C. Cls. Nov. 2, 1931) ---- 3

General Lead Batteries Co. v. *United States*, 60 F. (2d) 177 (C. Cls. July 5, 1932) ---- 3

Hall-Scott Motor Car Co. v. *United States*, 3 F. Supp. 818 (C. Cls. May 29, 1933) ---- 3

Hinsdale Mfg. Co. v. *United States*, 43 F. (2d) 263 (C. Cls. June 16, 1930) ---- 3

Jefferson Electric Mfg. Co. v. *United States*, 2 F. Supp. 778 (C. Cls. Mar. 13, 1933) ---- 3

Kokomo Automotive Mfg. Co. v. *United States*, H-386 (Pending in Court of Claims) ---- 3

McCaughn v. *Electric Storage Battery Co.*, 63 F. (2d) 715 (C. C. A. 3, Jan. 31, 1933) ---- 2

M and M Co. v. *United States*, 3 F. Supp. 886 (C. Cls. June 5, 1933) ---- 3

Magone v. *Heller*, 150 U. S. 70, 37 L. ed. 1001 (1893) ---- 6, 7, 8, 11, 12, 14

Magone v. *Wiederer*, 159 U. S. 565, 40 L. ed. 258 (1895) ---- 5, 7, 8, 11, 14

Mechanics Machine Co. v. *United States*, J-24 (pending in Court of Claims) ---- 3

Nelson Brothers v. *United States*, K-305 (pending in Court of Claims) ---- 4

New Process Gear Co. v. *United States*, H-466 (pending in Court of Claims) ---- 3

Parts Corporation v. *United States*, H-500 (pending in Court of Claims) ---- 3

Perfection Gear Co. v. *United States*, 41 F. (2d) 561 (C. Cls. June 16, 1930) ---- 3

Routzahn v. *Willard Storage Battery Co.*, 65 F. (2d) 89 (C. C. A. 6, May 9, 1933) ---- 3

Taher Auto Spring Co., Inc. v. *United States*, K-458 (pending in Court of Claims) ---- 3, 4

Tuthill Spring Co. v. *Reinecke*, 55 F. (2d) 415 (D. C. N. D. Ill. Dec. 21, 1931) ---- 3

Universal Battery Co. v. *United States*, 3 F. Supp. 878 (C. Cls. June 5, 1933) ---- 3

Universal Battery Co. v. *United States*, 281 U. S. 580, 74 L. ed. 1051 (May 26, 1930) ---- 1, 2, 3, 4, 5, 11, 12, 14

United States Gear Co. v. *United States*, H-455 (pending in Court of Claims) ---- 3

U. S. Light & Heat Corp. v. *United States*, 3 F. Supp. 861 (C. Cls. June 5, 1933) ---- 3

Virginia-Carolina Rubber Co. v. *United States*, M-363 (pending in Court of Claims) ---- 4

Page

Rulings of Bureau of Internal Revenue—
Sales Tax Ruling 380, Internal Revenue Cumulative Bulletin Vol. I-1, p. 444 ---------- 10
Sales Tax Ruling 395, Internal Revenue Cumulative Bulletin Vol. I-2, p. 295 ---------- 10
Sales Tax Ruling 408, Internal Revenue Cumulative Bulletin Vol. II-1, p. 285 ---------- 10
Sales Tax Ruling 422, Internal Revenue Cumulative Bulletin Vol. II-2, p. 310 ---------- 11
Sales Tax Ruling 426, Internal Revenue Cumulative Bulletin Vol. II-2, p. 308 ---------- 10

Briefs:
American Chain Co. v. *Eaton*, No. 196, respondent's brief, pp. 14-16 ---------- 1, 6, 12
Routzahn v. *Willard Storage Battery Co.*, No. 329, Petitioner's Brief, pp. 6, 9-21 ---------- 1, 6, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 196

AMERICAN CHAIN COMPANY, INC., *Petitioner,*

v.

ROBERT O. EATON, *Collector of Internal Revenue For The District of Connecticut, Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 329

C. F. ROUTZAHN, *Collector of Internal Revenue of the United States for the Eighteenth District of Ohio, Petitioner,*

v.

WILLARD STORAGE BATTERY COMPANY, *a Corporation, Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May it please the Court:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in the above cases as *amicus curiae.*

GEORGE M. MORRIS,
Amicus Curiae.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF GEORGE M. MORRIS AS AMICUS CURIAE

The Purpose of This Brief

This Court has been asked[1] to modify the test previously laid down by it[2] for determining whether cer-

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1. Petitioner's brief, pp. 6, 9-21, *Routzahn* v. *Willard Storage Battery Company*, No. 329. Responder 's brief, pp. 14-16, *American Chain Co.* v. *Eaton*, No. 196.
2. *Universal Battery Company* v. *United States*, 281 U. S. 580, 74 L. ed. 1051 (May 26, 1930).

tain articles are "automobile parts or accessories."

It is the purpose of this brief to point out the injustice and folly of making any modification of the existing law upon which taxpayer and Government alike have relied for many years.

I

The Doctrine of Universal Battery Company v. United States, as Interpreted by the Courts, Should Not Now Be Disturbed.

More than three years ago, this Court sustained the ten year old Treasury Regulations defining what constitutes a part or accessory for an automobile.[3] In the three years since the *Universal Battery Company* decision, the courts have consistently followed the test laid down in that case. In only one[4] of the twenty-one opinions[5] which have since been ren-

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3. *Universal Battery Company* v. *United States*, 281 U. S. 580 at 583.
4. *Eaton* v. *American Chain Co.*, 63 F. (2d) 783 (C. C. A. 2, March 6, 1933), now pending in this Court as No. 196, October Term, 1933.
5. *American Chain Co.* v. *Eaton*, 58 F. (2d) 246 (D. C. Conn., Feb. 5, 1931), 63 F. (2d) 783 (C. C. A. 2, Mar. 6, 1933);
Anthony Co. v. *United States*, 56 F. (2d) 481 (C. Cls. Mar. 7, 1932);
Bassick Mfg. Co. v. *United States*, 44 F. (2d) 278 (C. Cls. Oct. 20, 1930);
Crawford Mfg. Co. v. *United States*, 50 F. (2d) 280 (C. Cls. June 1, 1931);
Cuno Engineering Corp. v. *United States*, 43 F. (2d) 259 (C. Cls. June 16, 1930);
Dalton Foundries, Inc. v. *United States*, 56 F. (2d) 483 (C. Cls. Mar. 7, 1932);
Dutton & Sons Co. v. *United States*, 59 F. (2d) 839 (C. Cls. June 6, 1932);
Electric Storage Battery Co. v. *McCaughn*, 52 F. (2d) 205 (D. C. E. D. Penna., Apr. 28, 1931); 63 F. (2d) 715 (C. C. A. 3, Jan. 31, 1933);

dered, some in favor of and some against the Government, is there even an appearance of any confusion concerning that test. While there is no published record of the number of decisions by the Bureau of Internal Revenue which have followed the *Universal Battery Company* decision, in at least ten of the cases involving the taxability of articles as parts or accessories which are now pending before the Court of Claims alone,[6] the evidence has been taken and the

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5. Continued—
Englert Mfg. Co. v. *United States*, 3 F. Supp. 873 (C. Cls. June 5, 1933);
Fairmont Tool & Forging Co. v. *United States*, 42 F. (2d) 591 (C. Cls. June 16, 1930);
Frost Gear & Forge Co. v. *United States*, 52 F. (2d) 1022 (C. Cls. Nov. 2, 1931);
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M and M Co. v. *United States*, 3 F. Supp. 886 (C. Cls. June 5, 1933);
Perfection Gear Co. v. *United States*, 41 F. (2d) 561 (C. Cls. June 16, 1930);
Routzahn v. *Willard Storage Battery Co.*, 65 F. (2d) 89 (C. C. A. 6, May 9, 1933) (Opinion of the District Court for the Northern District of Ohio not reported.);
Tuthill Spring Co. v. *Reinecke*, 55 F. (2d) 415 (D. C. N. D. Ill. Dec. 21, 1931);
Universal Battery Co. v. *United States*, 3 F. Supp. 878 (C. Cls. June 5, 1933);
U. S. Light & Heat Corp. v. *United States*, 3 F. Supp. 861 (C. Cls. June 5, 1933).

6. *American Bosch Magneto Corp.* v. *United States*, Nos. H-516, H-517; *New Process Gear Co.* v. *United States*, H-466; *United States Gear Co.* v. *United States*, H-455; *Parts Corporation* v. *United States*, H-500; *Kokomo Automotive Mfg. Co.* v. *United States*, H-386; *Mechanics Machine Co.* v. *United States*, J-24; *Dalton & Balch, Inc.* v. *United States*, K-372; *Taher Auto Spring Co., Inc.*,

record made upon the basis of this Court's rulings in the *Universal* case.

This Court said in the *Universal Battery Company* case[7] that the construction of the law made by the administrative regulations (fully approved by this Court in that case) "had been adhered to in the Bureau of Internal Revenue for about ten years and ought not to be disturbed now unless plainly wrong." If that conclusion was sound when reached it should be doubly so now in view of the court judgments, Bureau rulings and cases tried since that pronouncement. Increased litigation, unnecessary expense and injustice to all concerned would result from either an enlargement or diminution of the boundaries previously run by this Court, and repeatedly retraced by the lower courts.

Great care may properly be urged upon this Court, therefore, to avoid opening again the questions which the *Universal* decision adequately closed.

II

The Request for Modification in the Existing Rule Has No Support in Law or Administrative Experience.

In *Universal Battery Company* v. *United States*,[8] this Court confirmed the test established by the Treasury Department and the Bureau of Internal

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6. Continued—
v. *United States*, K-458; *Virginia-Carolina Rubber Co.* v. *United States*, M-363; *Nelson Brothers* v. *United States*, K-305.

7. 281 U. S. 580 at 583.

8. 281 U. S. 580 at 583.

Revenue for determining what constitutes a "part" or "accessory," in the following language:

> "The administrative regulations issued under §900 uniformly have construed the term 'part' in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, [automobile truck, automobile wagon, other automobile or motorcycle] and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term 'accessory' as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.
>
> "This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. Certainly, it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone* v. *Wiederer*, 159 U. S. 555, 559, 40 L. ed. 258, 259, 16 Sup. Ct. Rep. 122. We think

> the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted."

In at least two cases[9] now pending before this Court the Government appears to urge that the foregoing ruling is inadequate. The contention is that the rule should place upon the taxpayer the burden of showing that the "chief use" of the article questioned is for other than automobile purposes, this to be accomplished by a demonstration that a greater number of the articles were used for non-automobile than for automobile purposes. This contention is grounded upon the theory that the "chief use" of an article is that use to which in a majority of instances it is put. Neither the theory nor the contention accords with established law.

The term "chief use" has had a settled meaning ever since 1893 when this Court in *Magone* v. *Heller*, 150 U. S. 70, 37 L. ed. 1001, created the practical instrument for determining existence or non-existence of chief use in each case. In that case the issue was whether a certain salt was chiefly, or expressly, used for manure. This Court said:

> "If the only common use of a substance is to be made into manure, or to be itself spread

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9. *Routzahn* v. *Willard Storage Battery Co.*, No. 329, petitioner's brief, pp. 6, 9-21, and *American Chain Company* v. *Eaton*, No. 196, respondent's brief, pp. 14-16.

> upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption. But if it is *commonly; practically* and *profitably* used for a different purpose, it cannot be considered as 'expressly used for manure,' even if in the majority of instances it is so used." (Italics supplied.)

Here we have an express adoption of common and practical use for more than one purpose, and a rejection of majority of instances, as the test for "chief use."

This test for chief use was confirmed by this Court in *Magone* v. *Wiederer*, 159 U. S. 555, 40 L. ed. 258. There, after quoting the above language, the Court said (at p. 562):

> "It follows that whilst *Magone* v. *Heller* adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. * * * Thus, we repeat, *Magone* v. *Heller*, whilst enforcing and applying the rule of chief use, furnished the instrument for determining and measuring its operation and giving certainty to its application."

The question before the Court in *Magone* v. *Wiederer* was the correctness of a charge to the jury by the District Court judge to the effect that if certain glass was just as applicable for different uses as for use in clocks, then it could not be said that its chief

use was for clocks. In upholding the charge below[10] this Court said:

> "The charge given by the Court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this Court in *Magone* v. *Heller*."

As the result of these two decisions it has been settled for forty years that if an article is commonly, practically and profitably used for more than one

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10. The charge of the court below read:

"In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury '*that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute.* * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristice as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant." (Italics supplied.)

purpose, it cannot be considered to have a chief use even though the larger number of the articles are employed in any one use.

The test for determining "chief use" is the same test employed by the Treasury Department, the Bureau of Internal Revenue and this Court for determining whether an article is taxable as an automobile part or accessory.

The Regulations promulgated by the Treasury Department[11] require the taxation as parts or accessories, of articles "primarily adapted" for automobile use. Articles having a general commercial use, or ordinarily sold for general use, the Regulations provide, cannot be considered as "primarily adapted" for automobile use. The Bureau of Internal Revenue has consistently applied this rule.

Miniature incandescent electric light bulbs "for use in automobiles" were viewed by the Bureau as nontaxable when sold separately because they were

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11. The first Regulations dealing with parts and accessories under Section 900, Revenue Act of 1918 were Articles 14, 15 and 16 of the Regulations 47, promulgated May 1, 1919. These Regulations were amended by Treasury Decision 2852, promulgated May 31, 1919, amending Articles 14 and 16; Treasury Decision 2893, promulgated July 17, 1919, amending Articles 14 and 16; Treasury Decision 2915, promulgated September 3, 1919, amending Article 14, and Treasury Decision 2989, promulgated March 3, 1920, amending Articles 14, 15 and 16. The first revision of Regulations 47 was published December 27, 1920. This revision was amended by Treasury Decision 3116, promulgated January 14, 1921, amending Article 15, and by Treasury Decision 3207, promulgated July 29, 1921, amending Article 15. A second revision of Treasury Regulations 47 was promulgated January 6, 1922. A third revision was promulgated August 29, 1924. These Regulations and amendments were collected and printed by petitioner in *Universal Battery Co.* v. *United States*, No. 127, October Term, 1929, and filed as a supplement to the brief therein.

"commercial commodities."[12] Leaf springs, because they "in their present form and design have been in use for a great many years and were used long before the advent of the automobile," "had been for many years and are today used for a great many purposes other than in automobiles," and "exactly the same spring in type and otherwise can be and is used for automobile and other purposes" were held not "primarily adapted" for automobile use.[13] Piston rings "generally as commercial commodities" were exempted by the Bureau.[14] The fact that spark plugs[15] and

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12. Sales Tax Ruling 408, Internal Revenue Cumulative Bulletin Vol. II-1, p. 285.
13. Sales Tax Ruling 395, Internal Revenue Cumulative Bulletin Vol. I-2, p. 295.
14. Sales Tax Ruling 380, Internal Revenue Cumulative Bulletin Vol. I-1, p. 444.
15. Sales Tax Ruling 426, Internal Revenue Cumulative Bulletin Vol. II-2, p. 308, 309.

"It is a well-known fact that spark plugs were in use for many years before automobiles came into existence. It is also common knowledge that they were used on all kinds of internal-combustion engines, both stationary and portable. * * * While they are used very extensively in automobiles, the same plugs are used in motor boats, airplanes, farm tractors, road graders, railway locomotive engines, thrashing engines, concrete mixers, water pumps, hoisting machines, and for innumerable other purposes.

* * * * * * *

"Applying the principle in the above cases to spark plugs, where it is clearly shown that the articles in question are not specially designed nor primarily adaptable only for use on or in connection with automobiles but are interchangeable and extensively used in many other industries, it is the opinion of this office that spark plugs should be held to be commercial commodities and not subject to the excise tax imposed by sections 900 (3) of the Revenue Acts of 1918 and 1921."

grease guns[16] were widely used commercially for a variety of purposes, only one of which was in connection with automobiles, turned the Bureau's decision as to those articles.

From the regulations and actual practice of the Bureau of Internal Revenue it is apparent that the term "primarily adapted" has the same meaning to the officials concerned with sound and workable tests for administering the tax law, as the term "chief use" has to this Court.[17] The "majority use" test was as completely ignored by them as it was rejected by this Court in *Magone* v. *Heller*, 150 U. S. 70 at 75.

The test found workable and sound by this Court forty years ago, and adopted and consistently employed in the Treasury Department regulations and Bureau of Internal Revenue rulings, was expressly affirmed by this Court in *Universal Battery Company* v. *United States*, 281 U. S. 580. When, therefore, complaint is made of failure by the Courts to con-

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16. Sales Tax Ruling 422, Internal Revenue Cumulative Bulletin Vol. II-2, p. 310.
Grease guns were not primarily adapted for automobile use, the Bureau ruled, because:
"From the information submitted it appears that high pressure grease guns are not primarily designed and adaptable for use on automobiles but are used in many industries where lubrication is necessary."

17. The parents of the provisions in the Treasury Regulations respecting the tests for determining what constitutes a part or accessory under the excise tax laws, are clearly the opinions of this Court in *Magone* v. *Heller*, 150 U. S. 70, *Magone* v. *Wiederer*, 159 U. S. 555, and the cases which preceded them. Such terms as "chiefly used," "chiefly adapted," etc., in those opinions become "primarily adapted" or "peculiarly adapted" in the later Regulations. "Commonly, practically and profitably used" in the old cases, becomes "general commercial use" or "commercial commodity" in the new Regulations and in the applications thereof.

sider the chief use of an article in determining whether it is a part or accessory for an automobile, the answer is that the chief use test actually has been employed when the test for primary adaptability of the part has been employed. When the complaint is made[18] that the courts have erred in failing to require a manufacturer to show that the greatest use of an article is for non-automobile purposes in order to establish that his product is not a part or accessory for automobiles, the answers are two. First, the chief use doctrine (cited as authority for the complaint) never included such a requirement, and second, this Court expressly in *Magone* v. *Heller*, 150 U. S. 70, 75, and impliedly in *Universal Battery Company* v. *United States*, 281 U. S. 580, rejected any such criterion.

The suggestion for modification of the rule in *Universal Battery Company* v. *United States*, 281 U. S. 580, has no foundation in law or in administrative experience. Modification should not be undertaken.

III

Requiring the Ascertainment of Primary Adaptation or Chief Use to Depend Upon a Majority Count Is Not Administratively Feasible.

In the cases now at this bar an effort is being made to make the issue of primary adaptation and chief use turn only upon actual count. It is submitted

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18. Government's brief, pp. 14-16, *American Chain Co.* v. *Eaton*, No. 196; Government's brief, p. 10, *Routzahn* v. *Willard Storage Battery Co.*, No. 329.

that this is the argument of an advocate and not that of an administrator of the tax laws. The administrative difficulties involved in such a rule foreclose its adoption.

As an example: Administratively, what would be determined where a count shows that in certain seasons of the year the majority of articles sold were employed for one use while in another season the majority sold were employed for another use?[19] Would the article be taxable as a part of device A from April to September but not taxable from October to March because its "majority" use was with device B in that period?

Again as an example, suppose that one manufacturer, or importer, sells a major portion of his product to the A trade while another sells the major portion of a product identical in design, purpose and construction, to the B trade.[20] What is the use of the article under the "majority" rule now urged? Is one of these producers to be taxed and the other not, or is the taxability to rest upon figures and information known only to other manufacturers or producers to which neither of the first two have access nor right?

Again, suppose a count would show that 35 per

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19. In *Englert Manufacturing Co.* v. *United States*, 3 F. Supp. 873, the experience of the witnesses was that the major use of their storage batteries in the winter months was in radios, while in the summer months the majority use was probably in automobiles.

20. In *Englert Manufacturing Co.* v. *United States*, 3 F. Supp. 873, one witness sold the storage batteries taxed almost exclusively to the radio sending and receiving trade. Another witness made most of his sales to the automobile trade.

cent of a certain article were used with device W, 35 per cent with device X, 20 per cent with device Y and 10 per cent with device Z. With what device is the major use?

As the rule stands at present, the difficulties in all such situations are not present. If there really exist substantial, common, practical, uses of an article beyond its employment on a single device, submission of these data to the tax, or tariff, administrator should dispose of most disputes. If, on the other hand, the disposition must await a majority count the answer might be interminably delayed. The probabilities of such delays would violate a fundamental principle in good tax administration.

Under the "count" rule now urged on the Court only a national, or possibly international, detailed and frequently repeated census would accurately determine the majority use of any article. The ordinary manufacturer, or importer, could not undertake such a task. Only an extensive governmental agency, therefore, could accomplish such undertakings and it is difficult to conceive of any but a rare occasion where the result would warrant the expense.

Once departure is made in the direction urged, certain it is that the question of chief use and primary adaptability will return again and again to vex this Court and the subsidiary courts adjudicating the excise tax and tariff laws. The doctrine first pronounced in *Magone* v. *Heller*, 150 U. S. 70, in 1893, approved in *Magone* v. *Wiederer*, 159 U. S. 555, and re-affirmed in *Universal Battery Company* v. *United States*, 281 U. S. 580, is clear, has been universally

accepted and has stood the test of administration satisfactorily. No modification is called for and none should be made.

Respectfully submitted,

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